NO. 449

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

MOONEY AIRCRAFT, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mooney Aircraft, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 5, 1967 (Petition for Rehearing in the said cause having been denied on May 5, 1967).

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, infra, pages 9-11 is reported in 337 F. 2d. 605.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 5, 1967. (Appendix A, infra, pages 9 - 11). The Supplemental Decree was entered on May 18, 1967. (Appendix B, infra, page 12). Rehearing was denied on May 5, 1967. (Appendix C, infra, page 13).

The jurisdiction of this Court is invoked under 28 USCA, Section 1254 (1).

III.

QUESTION PRESENTED

1. Whether the National Labor Relations Board and the United States Court of Appeals properly interpreted Section 10 (c) and (e) of the National Labor Relations Act and the Labor Agreement in connection with the reinstatement of George E. Mays.

IV.

STATUTORY PROVISION INVOLVED

The Statutory provisions involved in this case are Section 10 (c) and (e) of the National Labor Relations Act reading, in part, as follows:

Section 10 (c) "*** If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is

engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act ***."

Section 10 (e) "*** The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.***"

STATEMENT

Mays was terminated by Petitioner on August 9, 1962. At the time of termination he was classified as a Class A Mechanic in the Maintenance Department. He was reinstated to his former position on November 27, 1964 as a Class A Mechanic in the Maintenance Department under a Decree of the Fifth Circuit Court of Appeals, which enforced the Board's Decision and Order of June 5, 1963, which directed that Petitioner "*** offer to George E. Mays immediate and full reinstatement to his former or a substantially equivalent position *** and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him." (Italics ours). N.L.R.B. vs. Mooney Aircraft, Inc., (C.A.5), 328 F. 2d. 426.

The National Labor Relations Board offered no evidence whatsoever to show that Mays, in the absence of his discharge, should have been promoted to Leadman and, therefore, that his back pay

on reinstatement should have been calculated on the basis of Leadman's wages instead of Class A Mechanic's wages .

Petitioner, on the other hand, introduced portions of its Labor Agreement dated February 15, 1964 which reads, in part, as follows:

Article II. Seniority, *** Par. D " In cases of transfer, lay off, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal." (R. 74, 323-325). Petitioner also introduced evidence to show that C. C. Fritz and C. M. Stephens, the two leadmen in the Maintenance Department, were promoted to Leadmen during Mays' discharge. (R.102,103).

The Labor Agreement provides that seniority comes into play, insofar as promotions are concerned, only when ability and efficiency are equal. Petitioner introduced evidence to show that although Mays had seniority over Fritz and Stephens (R.366), Mays had only approximately six months experience (in three different jobs) prior to coming to work for Petitioner. Fritz and Stephens each had approximately twelve years experience prior to coming to work for Petitioner. (R.322,323).

Petitioner introduced a document titled "Leadman Qualifications". Said document listed the following requirements:

"1. Job knowledge, leadership, ability and initiative.

2. Ability to receive instructions and pass them on to other employees in a constructive manner.

3. Ability to read and understand engineering drawings (necessary in his area).

4. Proper attitude toward company objectives, and other employees and ability to get along with fellow employees.

5. Aggressive, productive and have the ability to impart this to other employees.

6. Good attendance record.

7. Working knowledge of necessary records and other paper work in his area.

8. Be able to plan their work to best advantage of expediency.

9. Ability to train new employees.

10. Must have, in the opinion of management, capability of future development as Senior Leadman and possibly Foreman or management material.

11. All requests for promotion for leadman must be approved by the Vice President of Manufacturing."

(R. Respondent's Exhibit No. 3, R. 264, 265, 378). Petitioner introduced evidence that these Leadan Qualifications had been in full force and effect since December 17, 1963. (R.378).

Petitioner introduced evidence that Fritz and Stephens had more efficiency and ability than Mays. (R. 267). Mays did not possess the initiative and leadership that were required for Leadman in the Maintenance Department. (R.266). There were complaints from his (Mays') fellow workers that they did not care to work with him. (R.311). Mays' attitude was of a belligerent nature. (R.322).

Mays testified that during the time he was employed by Loadcraft (between December of 1962 and November of 1964) he was absent only 3-1/2 days. (R.79,80). However, when later testifying under oath and after being presented with a sheet titled "Employee's Absentee Record", prepared by Loadcraft for the year 1963 only, which showed that Mays was absent a total of 21-1/2 days and tardy twice, Mays admitted that the list was correct. (Respondent's Exhibit No. 2; R.144-149, 317-320).

Prior to Mays' termination, during the period of time from January 1, 1962 through August 9, 1962, Mays was unreported absent forty hours, plus reported absent 24 hours plus a leave of absence of 56 hours. During this same period of time, Stephens was reported absent 13 hours plus an 8-hour leave of absence and Fritz was not absent at all. (R. 320,321).

Petitioner introduced evidence to show that Mays did not have the ability to train new employees. (R.385-389). By Mays' own admission he is not qualified to do the work that Fritz does. (R.103,104).

Although much emphasis was placed by the National Labor Relations Board on the fact that Mays was a Leadman on a sub-assembly project at Loadcraft during the period of his discharge, Petitioner introduced evidence to show that after having worked there approximately one year, and over a five-month period of time, Mays was:

1. First an acting Leadman.
2. 30 days later, went on probation as Leadman.
3. 30 days later, he made Leadman.

After about five months, Mays then regressed back to working "on a contract where the certified welders worked", and subsequently was pulled off the contract where the certified welders worked and was classified as a welder when he left the company. (R. 66-71, 161, 403, 404).

The determining factor is not whether Mays had the ability and efficiency -- it is whether Mays' efficiency and ability are equal to that of Frits and Stephens.

Since all of the evidence clearly shows that Mays' ability and efficiency are far below that of Fritz and Stephens, seniority would not be the governing factor in this promotion. Fritz and Stephens meet all of the requirements of Leadman in Respondent's Maintenance Department; Mays does not. (R.74, 220-222, 229-246, 251-261, 264-267, 323-325, 375-398, 378-391).

Mays was not at the time of his discharge and never had been a Leadman while in the employ of Petitioner. (R. 44-52).

REASON FOR GRANTING THE WRIT

1. This case presents an important question of first impression. The decision of the Court of Appeals is not in accord with the National Labor Relations Act and the evidence in this case.

This is not an unfair labor practice case. The issue is the correct formula for the determination of back pay under the National Labor Relations Act.

The National Labor Relations Board, who has the burden of proving the gross back pay due under the back pay period (N.L.R.B. vs. Mastro Plastics Corp., 1962, 50 LRRM 1006), offered no evidence whatsoever to show that Mays should have been promoted to Leadman had he not been discharged. The Labor Agreement, dated February 15, 1964, which was in full force and effect during all the time in question, provides that "In cases of ***promotion*** greater length of service governs if ability and efficiency are equal." (Italics ours). (R. 74, 323-325).

Petitioner, while it did not have the burden of proving,

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Petitioner, while it did not have the burden of proving, or the burden of going forward, introduced evidence to show "Leadman Qualifications" and introduced evidence to show

that both C. C. Fritz and C. M. Stephens, the only two who were promoted to Leadmen in the Maintenance Department during Mays' period of discharge, (R.102,103), were more able and efficient than Mays. These facts having been established by the evidence, seniority was not to be considered under the provisions of the Labor Agreement.

The National Labor Relations Board and the Fifth Circuit Court disregarded the provisions of the National Labor Relations Act, disregarded the provisions of the Labor Agreement and disregarded the evidence adduced at the trial.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21119

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MOONEY AIRCRAFT, INC.,
Respondent.

Supplemental Petition for Enforcement of an Order of the National Labor Relations Board. (Texas Case).

(April 5, 1967.)

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: Based on the Board's determination that George E. Mays had been discriminatorily discharged in August 1962 by *Mooney Aircraft, Inc.*, 142 NLRB 942, this Court earlier entered judgment enforcing the Board's order for reinstatement with backpay. *NLRB v. Mooney Aircraft, Inc.*, 5 Cir., 1964,

337 F.2d 605.[1] Following an extensive supplemental evidentiary hearing before a trial examiner whose decision was upheld by the Board, this cause is once again before the Court. The Board seeks a supplemental decree enforcing its backpay award of $2,952.30. This included, with appropriate computation,[2] a finding that Mays, had he not been discriminatorily discharged, would have been promoted from mechanic A to leadman on August 4, 1964.

Considering the public interest objective in backpay orders and the narrow issue involved, arising as it does out of a detailed factual hearing, the Court is of the view that this 1962 unfair labor practice should now be vindicated without further delay.

There is substantial evidence in the record from which the Board could conclude that Mays, by virtue of his seniority, in all probability would under the terms of the collective bargaining agreement[3] have been promoted to leadman on August 4, 1964. There is no merit to the contention that this exceeds the

[1] Mooney Aircraft is no stranger to such litigation. See Mooney Aircraft, Inc., 138 NLRB 1331, enforced, NLRB v. Mooney Aircraft, Inc., 5 Cir., 1964, 328 F. 2d 426; Mooney Aircraft, Inc., 132 NLRB 1194, enforced, NLRB v. Mooney Aircraft, Inc., 5 Cir., 1962, 310 F.2d 565.

[2] Backpay was computed on the basis of mechanic A wages through the period of reinstatement on November 27, 1964. From and after August 4, 1964, down through March 31, 1965, the last quarter prior to the hearing, there was added to the award an amount equal to the differential between the wages of a Mechanic A and those of a leadman.

[3] "In cases of transfer, lay off, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal."

Testimony of the Employer's witnesses disparaging Mays' ability and efficiency were discredited by the trial examiner and Board.

scope of the Board's remedial powers under its order which provided, inter alia, that Mays be reinstated "without prejudice to his seniority or other rights and privileges." These included Mays' prospect of, and right to, promotions.

This determination likewise forecloses the Employer's assertion that the Board erred in awarding wages for the period subsequent to the date of reinstatement. Failure to promote to leadman was, the Board found, itself discriminatory. The relief granted[4] was therefore necessary to extinguish the effects of the discrimination.

The Employer's final assertion, that the Board's allowance for Mays' absence record was insufficient, is groundless.

ORDER ENFORCED.

[4] This portion of the award related solely to the wage differential between the wages of a mechanic A and leadman, an award which Mays was, and will be, entitled to until the Company offers the promotion.

Adm. Office. U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 21,119
MOONEY AIRCRAFT, INC., Respondent.	)	

SUPPLEMENTAL DECREE

Before: RIVES and BROWN, Circuit Judges and GARZA, District Judge.

BY THE COURT: This Court, having on November 19, 1964, entered its decree enforcing the Board's order aginst Respondent, Mooney Aircraft, Inc., its officers, agents, successors, and assigns, and the Board, having petitioned this Court for the entry of a supplemental Decree specifying the amounts of backpay due; upon consideration of said petition.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, Mooney Aircraft, Inc., its officers, agents, successors, and assigns, shall:

Make whole George E. Mays for any loss of pay suffered (through March 31, 1965), by payment to him of the amount of $8,988.30, with interest and minus the tax withholding required by Federal and State laws.

ENTERED: MAY 18 1967

A true copy.
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Gilbert Ramirez
Deputy
New Orleans, Louisiana MAY 18 1967

(Original Filed - May 18, 1967)

[53-1964 - Brown]

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 5, 1967
EDWARD W. WADSWORTH
CLERK

NO. 21119

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

MOONEY AIRCRAFT, INC.,
Respondent.

Supplemental Petition for Enforcement of an Order of the National Labor Relations Board.

(May 5 , 1967)

On Petition for Rehearing

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.